Supreme Court, U.S.
FILED
JUL 9 _ 2003
OFFICE OF THE CLERK

No. 02-1761

IN THE

Supreme Court of the United States

BROSNAHAN BUILDERS, INC., KEVIN BROSNAHAN, and LINDA BROSNAHAN,

Petitioners,

v.

HARLEYSVILLE MUTUAL INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

JOHN S. SPADARO
MURPHY SPADARO & LANDON
824 Market Street, Suite 700
P.O. Box 8989
Wilmington, DE 19899
(302) 654-4600

Attorneys for Petitioners

181725

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement for Petitioner, Brosnahan Builders, Inc., was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that Statement.

TABLE OF CONTENTS

Page

Corporate Disclosure Statement i

Table of Contents ii

Table of Cited Authorities iii

I. Federal Courts Cannot Invent the Record .. 1

II. Federal Courts Cannot Reach Phantom Holdings 3

III. The Issue is Due Process 7

Conclusion 8

TABLE OF CITED AUTHORITIES

Page

Cases:

Aetna Cas. & Sur. Co. v. Cochran, 651 A.2d 859 (Md. 1995) 6

American Ins. Group v. Risk Enterprise Management Ltd., 761 A.2d 826 (Del. 2000) 4-5

Colonial Oil Indus. v. Underwriters, 491 S.E.2d 337 (Ga. 1997) 6

Columbia Union Nat'l Bank v. Hartford Acc. & Indem. Co., 669 F.2d 1210 (8th Cir. 1982) 6

Continental Cas. Co. v. Alexis I. du Pont School Dist., 317 A.2d 101 (Del. 1974) 4

Sentinel Ins. Co. v. First Ins. Co. of Hawaii, Ltd., 875 P.2d 894 (Hawaii 1994) 6

Rule:

Fed. R. Civ. P. 30(b)(6) 3, 4

Other Authority:

ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES (3d ed. 1995) 6

Petitioners Brosnahan Builders, Inc., Kevin Brosnahan and Linda Brosnahan (collectively, the "Brosnahans") make this reply in support of their petition for a writ of certiorari.

In their petition, the Brosnahans showed that the Third Circuit's opinion is not explicable in terms of ordinary legal error; that instead, it reflects a profound ignorance of the record on summary judgment. Harleysville responds as it did below: with sweeping generalities supported only by *ipse dixit*, as though the record (including Harleysville's own sworn testimony) did not exist.

Yet Harleysville's opposition is not unhelpful. It makes new and important concessions, and offers new insight on why Harleysville is wrong; that is, why the essential issues are the lack of meaningful appellate review, and the integrity of the summary judgment process.

I. Federal Courts Cannot Invent the Record

Time and again Harleysville defines the Third Circuit's opinion in terms of what it calls "well established" law: that claims against a contractor for breach of contract and faulty workmanship are not insurable. At page 3 of its opposition, Harleysville confirms that both lower courts held "that the breach of contract claim based on the insured's (sic) failure to perform their contractual obligations . . . is not a chance, fortuitous or unusual event . . . ." Opposition at 3 n.1. Later in the opposition, Harleysville reiterates the theme: "[T]he holding that there is no 'occurrence' or 'accident' when a general contractor fails to perform its contractual obligations is well-established law." *Id.* at 9. And again:

> [T]he underlying opinion reveals that the courts merely affirmed the well-established concept that

> a general liability insurance policy does not provide insurance coverage for claims of breach of contract based on shoddy workmanship.

Id.

But our petition showed emphatically (and Harleysville does not dispute) that Kevin and Linda Brosnahan are not ***contractors***, but ***individuals***. They were sued in their individual capacity for negligent misrepresentation only; the *Pinkert* complaint neither alleged any contract with them, nor pled breach of contract against them. The "workmanship" of which the Pinkerts complained was supplied by Brosnahan Builders as contractor, not by Kevin or Linda Brosnahan. Nor was any "workmanship" claim remotely pled by the Pinkerts against either individual.

If the Third Circuit's reasoning is as Harleysville describes, how did we get here? How did Harleysville prevail against Linda Brosnahan with respect to workmanship she never supplied, and that her antagonists never claimed she supplied? How did it prevail against Kevin Brosnahan, on this principle of "no coverage for contract claims", when he was never subject to a contract claim or party to any contract?

Does Harleysville seriously contend that the lower courts enjoy some license to invent a fictional record in the name of summary judgment? Will this Court, too, pretend that Kevin and Linda Brosnahan were parties to a contract that never existed? Or that either of these individuals — both of whom are separate and independent "named insureds" under the Harleysville policy — supplied some fictional "workmanship" that the Pinkerts never even alleged?

In short, Harleysville cannot so much as summarize the Third Circuit's ruling without revealing that court's utter

disregard of material facts. And it was just this sort of fuzzy thinking that led the lower courts astray.

II. Federal Courts Cannot Reach Phantom Holdings

Harleysville's defense of the Third Circuit's analysis grows more tortured (and more revealing) on the issue of the "subcontractor's exception." Again, the "your work" exclusion (Exclusion (m)) bars coverage for claims of property damage to a contractor's work under specified conditions. But the exclusion contains an express exception: it does not apply "if the damaged work or the work out of which the damage arises was performed on [the insured's] behalf by a subcontractor." There has never been any dispute, meanwhile, that the *Pinkert* complaint targeted work done by subcontractors. Nor is there any dispute that Harleysville was made aware of the subcontractors' role through the Brosnahans' December 1999 letter. *See* petition at 13-15 (quoting from both the December 1999 letter, and Harleysville's testimony under Fed. R. Civ. P. 30(b)(6)).

Harleysville's task is to explain how the Third Circuit came to ignore this critical evidence; and how it came to find as a matter of law, against all the record evidence, that "[w]hen the Brosnahans filed a third-party complaint against subcontractors in October of 2000, Harleysville was presented ***for the first time***, through the averments in the third-party complaint, with the possibility that subcontractors negligently and accidentally caused damage to the building." App. 4(a) (emphasis added).

Harleysville meets this challenge (or purports to) by ascribing to the Third Circuit a phantom holding. The Third Circuit merely applied the "four corners" rule, says Harleysville, with two happy consequences: Harleysville could ignore the true facts of the subcontractors' involvement

in weighing its duty to defend; and the court could reject evidence of Harleysville's knowledge of the true facts on summary judgment.

But this is the stuff of fantasy. To begin with, the Third Circuit's opinion makes no reference to any "four corners" rule, or to any case law on the subject. It makes no mention of the December 1999 letter, or Harleysville's related 30(b)(6) testimony, or (indeed) the subcontractor's exception itself. And far from holding that Harleysville's first (December 1999) notice of the subcontractors' role could be discounted, it held expressly that other events (in October 2000) constituted notice of that role "for the first time." Harleysville thus argues that to understand the Third Circuit's ruling, we must contradict it, by reading the words "first time" as "second time" or "last time."

But that is not all. Harleysville's *apologia* for the Third Circuit assumes a "four corners" rule, whereby an insurer may ignore facts extrinsic to the underlying complaint that might otherwise trigger a duty to defend. Not only is that rule a fiction, but in the briefs below, the Brosnahans referred the Third Circuit to more than ***fifty*** reported decisions to the contrary — including a reported decision of the Delaware Supreme Court.

Harleysville cites *Continental Cas. Co. v. Alexis I. du Pont School Dist.*, 317 A.2d 101 (Del. 1974) as support for its backward reading of the "four corners" rule. But in that case, neither insurer nor insured looked to facts outside the underlying complaint. *Alexis I. du Pont School Dist.*, 317 A.2d at 103-05. It was not until the later case of *American Ins. Group v. Risk Enterprise Management Ltd.*, 761 A.2d

826 (Del. 2000) that the Delaware Supreme Court confronted an active attempt to resort to extrinsic facts:

> In construing an insurer's duty to indemnify and/or defend a claim asserted against its insured, a court typically looks to the allegations of the complaint. . . . The rationale underlying this principle is that the determination of whether a party has a duty to defend should be made at the outset of the case, both to provide the insured with a defense at the beginning of the litigation and to permit the insurer, as the defraying entity, to control the defense strategy. The present case, however, presents an unusual situation. [The insured] did not make a demand for defense until after the completion of discovery, almost three years after the underlying tort action was filed. Moreover, the determination of whether a duty to defend existed is being made after the underlying litigation has been settled. For these reasons, the urgency that often exists at the outset of litigation is not present.

Risk Enterprise Management, 761 A.2d at 829 (citation omitted). This analysis requires, if anything, that an insurer ***acknowledge*** extrinsic facts that it does not genuinely dispute. More than this, it suggests that Delaware law would not allow Harleysville to disregard the undisputed role of subcontractors where (as here) there was no remaining urgency to the "duty to defend" analysis. (Here, after all, the underlying lawsuit has long since settled.)

There is thus no magic in the "four corners" rule that permits an insurer to ignore undisputed facts laid at its doorstep. That is why Harleysville's insurance expert was able to collect forty-seven reported decisions for the

proposition that where "an insurer obtains information from which it appears that there might be coverage . . . the company has a duty to defend, even if the allegations of the complaint themselves would not give rise to such a duty." ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES § 4.03 (3d ed. 1995) (collecting cases). *See also Columbia Union Nat'l Bank v. Hartford Acc. & Indem. Co.*, 669 F.2d 1210, 1215 (8th Cir. 1982) ("Before declining to defend, an insurer has an obligation to look beyond the allegations made in the complaint . . ."); *Colonial Oil Indus. v. Underwriters*, 491 S.E.2d 337, 338-39 (Ga. 1997) (insurer has a duty to conduct a reasonable investigation and to base its coverage decision on the "true facts"); *Aetna Cas. & Sur. Co. v. Cochran*, 651 A.2d 859, 863-66 (Md. 1995) (realities of liability insurance require insurer to examine facts extrinsic to the underlying complaint); *Sentinel Ins. Co. v. First Ins. Co. of Hawaii, Ltd.*, 875 P.2d 894, 905-07 (Hawaii 1994) (insurer must consider any facts it can reasonably discover).

Harleysville's exegesis thus fails. The Third Circuit did not consciously reject the December 1999 letter under any imagined legal doctrine; rather, it failed to consider either the letter or the testimony on the letter's effect, being ignorant of both (though both were prominently featured in the Brosnahans' briefs below). That is why it found (as a matter of law, no less) that Harleysville learned of the subcontractors' role "for the first time" in October 2000.

Harleysville concedes that the entire appeal turned on the applicability of the subcontractor's exception to Exclusion (m) — and, by logical extension, on the role of the subcontractors themselves. Opposition at 4 (conceding that "if a subcontractor negligently damages other contractor's work, then the 'subcontractor exception' to the workmanship exclusion . . . may be triggered and thereby afford coverage. . . .") Given the importance of this issue, due process requires that it be decided on the actual record.

III. The Issue is Due Process

To be sure, the dispute on the merits is a matter of contract law. From this Harleysville argues that there can be no due process question — as though the mere presence of a state law dispute were enough to guarantee due process in every proceeding. But the evidence that the Third Circuit simply ignored this appeal is strong, and Harleysville cannot overcome it.

Harleysville is thus left to argue that due process does not matter — that the middling claims of a husband, his wife and their family-owned business are not worthy of due process. And so Harleysville insists that the Third Circuit can properly render summary judgment on the legal effect of a written agreement without considering undisputed evidence that the agreement was procured by falsehood. Opposition at 7 (arguing that "[w]hether the insured was misled . . . as to the significance of signing a non-waiver agreement is immaterial. . . .")

Whatever the outcome on the merits, Harleysville's conception of due process is repugnant. It should be rejected in the strongest terms.

Finally, we cannot pass over Harleysville's false quotation. It appears at the top of page 8 of Harleysville's opposition, with a citation to page 5 of the Brosnahan's petition. It clearly suggests to the reader that the quoted matter was taken from the petition itself — when in fact those words appear nowhere on page 5 of the petition, nor anywhere else in the petition's text.

The substantive mischief of this false quotation is negligible, but it speaks to Harleysville's approach to the issues: Say anything. Make any claim, with or without

support. If the facts are unfavorable, distort those that can be distorted and ignore the rest. The federal courts will never know the difference.

More than any other instrument of government, this Court is synonymous in the public mind with justice itself. Let this be the Court that finally confronts the true record, and brings fairness to the proceedings.

CONCLUSION

For the reasons stated in their petition, and for the reasons offered here, the petitioners seek review in this Court for the purpose of remanding this matter for meaningful appellate review.

Respectfully submitted,

JOHN S. SPADARO
MURPHY SPADARO & LANDON
824 Market Street, Suite 700
P.O. Box 8989
Wilmington, DE 19899
(302) 654-4600

Attorneys for Petitioners